Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

RICHARD PEDRONI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991), holding that the government is required to prove in a criminal tax case that the defendant intentionally violated a known legal duty, equally applies to a criminal tax conspiracy case.

2. Whether the defendant in a tax conspiracy case is entitled to an instruction to the jury that he claimed to have relied upon the advice of a tax professional in conducting his business activities.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard Pedroni petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra*, 5a-16a) is unpublished.

JURISDICTION

The judgment of the Court of Appeals was filed on April 18, 2002. A petition for rehearing and rehearing *en banc* was denied on June 13, 2002, with Chief Judge Becker dissenting (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 18 U.S.C. § 371, § 1343, § 1957 and 26 U.S.C. § 7201, are set forth in the Appendix, *infra*, 17a-19a.

STATEMENT

After a nine-month jury trial, Petitioner Richard Pedroni was acquitted of all fifteen substantive charges including the eight federal excise tax charges and was also acquitted of all state tax charges (wire fraud) and related money laundering charges. He was, however, convicted of a single count of conspiracy to violate four tax-related objectives: (1) to commit federal excise tax fraud, (2) to hinder and impede the IRS, (3) to commit wire fraud by violating New Jersey excise taxes, and (4) to transfer the proceeds of the state tax fraud in interstate commerce (money laundering). He was sentenced to thirty-seven months in prison and ordered to pay $500,000 to the IRS as restitution. (A123-4; App., *infra*, 6a).[1]

Petitioner was the President of Pedroni Fuel, Inc., a fuel supply company. He was alleged to have sold No. 2 oil to Kings Motor Oil and PetroPlus, the principals of which were thereafter charged, together with Petitioner, with setting up "daisy chains" to avoid excise taxes. Pedroni Fuel was involved in only 78 of the 1,011 transactions at issue, seven percent by volume. (A1066) The other 93 percent of the oil supplied to Kings and PetroPlus was sold by Chevron, Exxon, Mobil, Gulf, and others. (A2327, 1798, 1814) These other suppliers were regarded by the government to have been acting legally (A1847, 2030). Chevron sold four times as much oil as Pedroni Fuel. (A4338) Of the suppliers, Petitioner alone made a decision not to make further sales to

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[1] "A" references are to the joint appendix in the court of appeals. We have lodged a copy of the joint appendix with the Clerk.

Kings after June 1992. (A1576, 2336). The sales by the other companies supplying oil to Kings continued until some time in 1994.[2]

The prices charged Kings were normal market prices. (A2340-41). There was no evidence that Petitioner himself received anything other than his regular salary, which was comparable to the salaries of the other four senior officers. (A2532). He received no share in any illegal profits or improper payments. (A2345). Petitioner's sales were all made on behalf of Pedroni Fuel.

Pedroni Fuel sold many other products in addition to No. 2 oil. Petitioner's sales duties were a minute portion of his responsibilities, which included responsibility for real estate development operations, dispatching operations, government bidding, personnel decisions, oil purchasing, and hedging in the futures markets. (A2513-14, 2521).

Ron Supa was Petitioner's CPA and had supervised the tax department of Pedroni Fuel for twenty years. (A2503, 2521). Supa was responsible for ensuring compliance with all IRS directives. He also made the federal and state tax decisions and filings based on the customer's status as a "637" license holder eligible to purchase No. 2 oil on a tax-free basis as home heating oil. (A2521-23). Petitioner never countermanded any tax decision by Supa. (A2524). Pursuant to Supa's standing orders, Pedroni Fuel would not sell No. 2 oil on a tax-free basis unless it confirmed and verified that the buyer had a 637 license and a state license that permitted it to

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[2] The 78 Pedroni Fuel sales were made over a three-year period and were a minute portion of its business. Such sales were an insignificant part of Petitioner's personal responsibilities. While Petitioner authorized some of the sales, calls soliciting purchases would come in directly to one of three members of the sales department that included Petitioner. (A2521). Such calls would customarily last twenty seconds. (A2514). Pedroni Fuel had 4,500 to 5,000 active customer accounts and had tens of thousands of transactions yearly. (A2503).

make tax-free sales. (A2503). In so doing, Supa replicated precisely the paperwork and practices of the major oil companies, including the collection of all supporting documentation.[3] (A2521-23). Based upon Supa's advice and expertise, Petitioner directed that his company comply with IRS procedures and sell to licensed 637 holders only after it checked with the IRS. As Petitioner understood, his observance of this protocol satisfied all possible tax obligations. (E.g., A2522-32, 2550-57).

Petitioner never asked Supa to violate the procedures which Supa established and which they both understood protected them from any potential adverse excise tax consequences. (A2523-24). At trial, Supa and the defense expert witnesses explained that Petitioner did exactly what the IRS and the State of New Jersey advised sellers to do in order to remain absolutely protected from any tax liabilities or involvement in someone else's tax problems. (A2539, 2522-25). When taxes were applicable, Pedroni Fuel charged them (A2523) even to the purchasers which the government alleged to be conspirators. (e.g., A2530, 1973-75, 1154, 1077-78).[4]

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[3] Requiring a 637 license on each transaction provided two-fold protection. For example, during the same period of time, Sunoco always made sales of No. 2 oil as non-taxable (federal and state) because the commodity itself was exempt. Sunoco's computers and distribution system were set up so that if No. 2 oil was being sold to a purchaser, it would always be sold as non-taxable because it was a non-taxable commodity. (A2540). No further inquiries were deemed necessary.

[4] One of Petitioner's witnesses at trial was Bill Horn, who was IRS Commissioner Goldberg's spokesman to the fuel industry. During his government service, Horn drafted Notice 88-30 for the IRS. Pursuant to that published IRS directive (1988-1 Cum. Bull. 497), there was no duty imposed upon a seller to look beyond his purchaser's license as verified by the IRS. (E.g., A2578-79) After Petitioner's CPA explained this IRS ruling to Petitioner, the CPA instituted a system at Pedroni Fuel to ensure compliance with all tax requirements.

Suppliers such as Pedroni Fuel had no right to charge state and federal taxes on a sale to a state and federal license holder if the buyer wished to buy "ex-tax." (2540, 2524). The IRS required sellers in the industry to check the validity of 637 license numbers of their purchasers with the IRS. (A2552-53) The IRS notified suppliers if a 637 license number had been revoked. (A2555) If, after confirming the validity of a buyer's 637 license with the IRS, a dealer sold No. 2 oil tax-free to that buyer, the seller was absolutely protected from any tax liability. (A2555-56, 2552-53, 2550). As the IRS Commissioner's spokesman testified, a seller had no duty to investigate further. (A2550-2551, 2540, 2579). Until a supplier was notified that a 637 number it had checked was revoked, the supplier had a right to make tax-free sales and rely on the proposed purchaser's 637 license. (A2550-51, 2552-53, 2555-57). In such circumstances, the seller was protected from IRS liability of any kind. (A2552-53, 2555-57).

At trial, the Court sought to identify the legal duty that Petitioner knowingly and intentionally violated in accordance with this Court's decision in *Cheek v. United States*, 498 U.S. 192, 201 (1991). To this end, the trial court pointedly asked government counsel exactly what it was that Petitioner did to violate the law. The following colloquy ensued (A2594):

MR. STAHL [government counsel]: Well, what Mr. Pedroni did different than the Chevrons and the Mobils and the Exxons is that he joined the conspiracy. And I think that's what we demonstrated during the first rule 29 motions.

THE COURT: What act did he do?
MR. STAHL: What act did he do?
THE COURT: Yeah.
MR. STAHL: He had—
THE COURT: Did he act selling the fuel, is that the act?
MR. STAHL: Well, no. *Yeah*, selling the fuel, knowing he was involved in a daisy chain scheme, that

> he was supplying it. Because he was not stupid enough or greedy enough to take cash that we can prove or any other benefits other than the normal price does not—
>
> THE COURT: *A non-greedy co-conspirator, a new—*
>
> MR. STAHL: Right.
>
> THE COURT: *—A new character on the field.*

(A2594) (Emphasis supplied).

To this date, the government has never identified the known duty that Petitioner voluntarily and intentionally violated, in accordance with the *Cheek* standard. Here, the advice from Petitioner's CPA, upon which Petitioner relied, established that Petitioner believed in good faith that he violated no duty. Petitioner was not the taxpayer; he was simply an employee of a seller of oil in an industry regulated by the tax authorities. He strictly observed the procedure instituted by his CPA in accordance with the IRS rules. He relied on his CPA in all respects as to these issues and never deviated from his CPA's decisions, methods or policies.[5] (A2524) Indeed, the government's witnesses conceded and defense experts confirmed that Pedroni Fuel filed proper returns and complied with the tax laws. (*E.g.*, A2325, 2377, A2539).

Petitioner's conduct was identical to that of the entire oil industry, which properly relied on the outstanding IRS licenses and the reporting system, as the IRS advised them to do. (*E.g.* A2527, 2552-53, 2555-57). This system relieved sellers such as Pedroni Fuel from having to trace the subsequent sales made by their purchasers. The system recognized that Petitioner could not examine the books and

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[5] The district court had substantial questions as to the sufficiency of the evidence in support of Petitioner's conspiracy conviction (A2625-32). As a result, it granted Petitioner bail throughout the 24-month period during which his appeal was pending. (A124). However, after affirmance and denial of rehearing and rehearing en banc, the court of appeals issued the mandate and an order requiring Petitioner to surrender on July 22, 2002.

tax returns of his purchasers Kings and PetroPlus to gauge their compliance with the tax laws. In fact, Petitioner had less ability than the IRS to gather information about Kings and PetroPlus.[6]

At the conclusion of the trial, Petitioner sought jury instructions on the conspiracy charge relating to willfulness under the *Cheek* standard and his affirmative defense of good faith reliance on the advice of his tax professional. However, the district court refused to give any of Petitioner's requests to charge the jury that willfulness was required and good faith was a defense. (A763-764, 767-772, 743-747, 707-15) Indeed, the court refused even the following charge, quoted directly from this Court's opinion in *Cheek, supra*, 498 U.S. at 204:

> In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law and it is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.

(A761) Moreover, Petitioner requested the following jury instruction with respect to his good faith understanding of his role and tax responsibilities as supplier of tax-exempt product to tax-exempt buyers:

> . . . Defendant Richard Pedroni has introduced evidence that he relied on the advice of an accountant, Mr. Supa. If you find that Richard Pedroni in good faith placed reliance on this accountant to make sure that Pedroni Fuel acted properly with respect to all tax laws, or such

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[6] The IRS left the Kings defendants licensed to continue as IRS-approved tax free purchasers. (A2555-2556) As long as they were so licensed, Petitioner and the rest of the industry had a right to sell those customers No. 2 oil on a tax-free basis by relying on their outstanding license. (A2555-2557, 2565, 2541).

> evidence raises in your mind a reasonable doubt as to Mr. Pedroni's guilt, you should find him not guilty. . . .

(A 769) Petitioner also requested, *inter alia*, numerous other good-faith defense charges based upon the testimony of the CPA and employees at Pedroni Fuel who dealt with the tax issues and made the decisions. (A763-4, 767-72, 743-47). However, the district court also refused to give any of these instructions.

The court of appeals affirmed (App., *infra*, 3a-16a). In so holding, the court of appeals did not address with any detailed specificity the district court's failure to instruct the jury on willfulness under the *Cheek* standard, or on Petitioner's affirmative defense of good faith reliance on the advice of a tax professional. The following two sentences constitute the court of appeals' entire opinion on these allegations of error:

> We have previously made clear that a District Court's failure to give a good-faith defense instruction does not constitute an abuse of discretion, so long as the charge included detailed instructions on the elements of the crime. *Gross*, 961 F.2d at 1103 ("[A] jury finding of good faith is inconsistent with a finding that a defendant acted knowingly and willfully.") Consistent with our practice to review the entire jury charge as a whole, the record is clear that the District Court adequately charged the jury on willfulness. It was not in error to refuse to charge the defense of good faith.

(App. *infra*, 8a)

REASONS FOR GRANTING THE PETITION

1.a. This petition for certiorari in this criminal tax case presents two important questions about which courts of appeals are divided. Resolution by this Court of these conflicts is necessary to establish uniform ground rules for the trial of such cases.

More than a decade ago, this Court held in *Cheek v. United States*, 498 U.S. 192, 201 (1991), that a defendant in a criminal tax case was entitled to a jury instruction that the government was required "to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Since the Court's ruling in *Cheek*, the courts of appeals have divided on the question whether a defendant charged with conspiracy to hinder or obstruct the IRS and to violate the tax laws, in violation of 18 U.S.C. 371, is likewise entitled to a *Cheek* instruction defining willfulness.

Here, with no elaboration, the decision below ruled that Petitioner was not entitled to a *Cheek* instruction with respect to the conspiracy charge. This was the only charge upon which he was convicted. In so holding, the court of appeals' decision in this case directly conflicts with the Second Circuit's clearly articulated position that a defendant in a criminal tax conspiracy case is entitled to a *Cheek* instruction defining willfulness so as to submit the affirmative defense of good faith reliance to the jury. *United States v. Regan*, 937 F.2d 823, 826-827 (2d Cir. 1991). *Accord, United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991). On the other hand, the Seventh and Eighth Circuits have adopted precisely the opposite position, holding that *Cheek* does not apply to tax and *Klein*-type conspiracy cases. *United States v. Cyprian*, 23 F.3d 1189, 1201 (7th Cir.), *cert. denied*, 513 U.S. 879 (1994); *United States v. Jackson*, 33 F.3d 866, 871 (7th Cir. 1994); *United States v. Derezinski*, 945 F.2d 1006, 1012 (8th Cir. 1991). The question is important given the frequent inclusion of conspiracy charges in criminal tax cases.[7] Absent resolution by this Court, the conflict among the circuits as to the scope of this Court's ruling in *Cheek* will

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[7] Such tax conspiracy prosecutions are known as *Klein*-type conspiracies and were first approved in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924 (1958).

persist and create uncertainty for both bench and bar alike. The proper content of jury instructions in such tax conspiracy cases should be subject to a uniform rule that does not vary with geographic happenstance. Plenary review by this Court is therefore amply justified.

b. In upholding the trial court's refusal to instruct the jury on Petitioner's defense of good faith reliance upon the advice of his tax professional, the decision below conflicts with rulings of the Second, Fourth, Fifth, Sixth and Ninth Circuits. These courts have recognized the validity of such a defense in negating willfulness and required trial judges to give such a specific instruction whenever that defense is raised by a defendant. *United States v. MacKenzie*, 777 F.2d 811, 820 (2d Cir. 1985); *United States v. Mitchell*, 795 F.2d 285, 288 (4th Cir. 1974); *Strauss v. United States*, 376 F.2d 416 (5th Cir. 1967); *Bursten v. United States*, 395 F.2d 976, 981 (5th Cir. 1968); *United States v. Duncan*, 850 F.2d 1104, 1117-1119 (6th Cir. 1988); *United States v. Anshen*, 993 F.2d 884 (9th Cir. 1993) (reported at 1993 WL 164657). These five circuits have held that the defense of reliance upon the advice of a tax professional requires a special instruction separate and apart from the general good-faith instruction. However, the Seventh Circuit and now the Third Circuit have ruled to the contrary, holding that the *Cheek* instruction on willfulness obviates the need for a separate instruction on reliance upon the advice of a tax professional. *United States v. Brimberry*, 961 F.2d 1286, 1921 (7th Cir. 1992), *United States v. Becker*, 965 F.2d 383, 388 (7th Cir. 1992), *cert. denied*, 507 U.S. 971 (1993).

The increased role of tax professionals, such as lawyers and accountants, in assisting their clients with the growing complexity of the tax laws, necessarily increases the likelihood that defendants in criminal tax cases will assert the defense of good-faith reliance upon the advice of a tax professional. The resolution of this conflict among the cir-

cuits is therefore necessary to clarify whether, and under what circumstances, this defense requires a special jury instruction separate and apart from an instruction on willfulness.

2.a. The decision below affirmed Petitioner's conviction under 18 U.S.C. 371, for "knowingly, willfully and unlawfully" engaging in a conspiracy to commit four objects. (A247) The four objects were all offenses predicated on tax violations. But in so holding, the Court of Appeals overlooked the district court's failure to instruct the jury in accordance with the rule established by this court in *Cheek*, that willfulness, for purposes of a tax offense, is a violation of a known legal duty. This error critically prejudiced the jury verdict insofar as it permitted the jury to convict Petitioner on this single count on the basis of the wrong legal standard for the conspiracy offense charged, which included tax offenses as its objects.

A review of this Court's *Cheek* decision demonstrates the error of the district court's jury instructions in this case. In *Cheek*, the defendant was charged with willfully failing to file federal income tax returns in violation of 26 U.S.C. 7203. At trial, the defendant in *Cheek* testified that based upon information derived from meetings he attended, he sincerely believed that the Sixteenth Amendment did not authorize a tax on wages. As a result, he argued that he lacked the willfulness required for conviction. In charging the jury, the trial court in *Cheek* nevertheless advised that an honest but unreasonable belief was not a defense, and did not negate willfulness. That court further stated that the conclusion that wages are not income was not objectively reasonable.

This Court held in *Cheek* that the defendant was entitled to an instruction defining willfulness as follows: (498 U.S. at 201-202):

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, *that the*

> *defendant knew of this duty, and that he voluntarily and intentionally violated that duty . . . In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue*, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable. (emphasis added)

In *Cheek*, the defendant had claimed a good-faith belief that his wages could not be subjected to the income tax. As this Court noted, to conclude that Cheek's claimed good-faith belief must be objectively reasonable would transform the inquiry into a legal one and prevent the jury from considering the factual issue of willfulness. This focus altered the legal meaning of willfulness in *all* criminal tax cases. This Court concluded that the trial court erred in instructing the jury to disregard evidence of Cheek's understanding that he was not required to file a return or to pay income taxes on his wages, no matter how unreasonable his belief.

b. The trial court's error in *Cheek* was precisely replicated by the district court below in its instruction to the jury on the conspiracy charge alone. Here, the district court's definition of "willfully" in Instruction No. 38 (A590-591) failed to specify, in accordance with Petitioner's request, that the conspiracy had to further the voluntary, intentional violation of a known legal duty, as required by this Court in *Cheek*. In marked contrast, however, the district court's substantive excise tax evasion charge to the jury in Instruction No. 57 contained the required *Cheek* reference to a known legal duty. (A617)[8] Since the four objects of the conspiracy were either

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[8] It is therefore understandable that the jury acquitted Petitioner of the substantive counts in the Indictment. Since the objects of the conspiracy were either tax offenses or offenses predicated on tax offenses, the conspiracy charge should also have been framed in terms of a willful violation of a "known legal duty."

tax offenses or offenses predicated on tax offenses, it was essential that the conspiracy charge likewise be framed in terms of the "violation of a known legal duty." Under the teaching of *Cheek*, these are important words for a proper jury instruction in a criminal tax case. As this Court recognized, these words cannot be glossed over by a trial court or stated imprecisely without causing profound confusion over the proper legal standard. Indeed, even if the element of willfulness applied to only one of the four objects of the conspiracy, which it assuredly did, the possibility that the jury could convict on any one of the objects (A638) required the *Cheek* definition of willfulness to be included in the jury instructions; otherwise, a defective jury verdict on a defective theory was possible. *E.g., Griffin v. United States*, 502 U.S. 46 (1991); *United States v. Self*, 2 F.3d 1071, 1092-1094 (10th Cir. 1993).

Like the substantive tax charge in *Cheek*, it stands to reason that the conspiracy offense upon which Petitioner was convicted also requires evidence of willfulness. The indictment charged that the defendants "knowingly and willfully and unlawfully" conspired. (A247) Moreover, the objects of a *Klein*-type conspiracy were all premised on tax statutory offenses which require willfulness. There is accordingly solid support in the plain language of the statutes for the application of the *Cheek* definition of willfulness to jury instructions in tax conspiracy cases. It is therefore understandable that in *United States v. Regan, supra*, 937 F.2d 823 (2d Cir. 1991), the Second Circuit has held that the *Cheek* definition fully applies to tax conspiracy cases. As that court stated:

> Appellants were entitled to have the trial court clearly instruct the jury, relative to appellants' theory of defense to the tax charges, that the theory if believed justified acquittal on those charges. One of the most esoteric areas of the law is that of federal taxation. It is replete with "full-grown intricacies", and it is rare that a

> "simple, direct statement of the law can be made without caveat." Justice White, writing for the Court majority in *Cheek*, . . . stated that, because of the proliferation of tax statutes and regulations, the common-law presumption that every person knows the law does not apply where violations of federal criminal tax law are alleged. Instead, proof of guilt in such cases must be predicated upon a "voluntary, intentional violation of a known legal duty." This rule applies to alleged violations of the "hierarchy of tax offenses set forth in §§ 7201-7207, inclusive. *It also applies to 18 U.S.C. § 371 conspiracies to violate one or more of the hierarchy of tax offenses.*"

Id. at 827. (internal cites omitted) (emphasis added)

Furthermore, the Second Circuit's position was anticipated by this Court's opinion in *Ingram v. United States*, 360 U.S. 672 (1959). There, the Court reversed the conspiracy convictions of two employees to commit tax evasion with their employers who operated a lottery. As the Court observed, "an essential ingredient of the proof was knowledge [by the employees] that [their employers] were liable for federal taxes by reason of the gambling operation." (360 U.S. at 678). Thus, the Court declared that a "[C]onspiracy to commit a particular substantive offense cannot exist without the degree of criminal intent necessary for the substantive offense itself." *Ingram, supra*, at 678.

Despite this Court's pronouncement in *Ingram* that the pre-*Cheek* definition of willfulness applied equally to tax conspiracies and to substantive tax offenses, a square conflict of decisions has arisen among the circuits as to whether the *Cheek* definition of willfulness likewise applies to tax conspiracies. The Sixth, Seventh, and Eighth Circuits, and now the Third Circuit in the decision below, have all adopted a contrary standard for 18 U.S.C. 371 conspiracies to hinder and obstruct the IRS and/or to commit tax conspiracies. These courts have held that the *Cheek* definition of

willfulness does not apply to tax conspiracy cases. Thus, in *United States v. Derezinski*, 945 F.2d 1006, 1012 (8th Cir. 1991) the Eighth Circuit held:

> In *Cheek*, the Court explained that when wilfulness is an express element in a criminal tax statute the Government bears the burden of showing that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id.* at 111 S.Ct. at 610. *Cheek* does not apply to this case because the Government prosecuted *Derezinski* under a general conspiracy statute, not a criminal tax statute and because willfulness is not an express element of Section 371.

In *United States v. Cyprian, supra*, 23 F.3d 1189, 1201 (7th 1994), the Seventh Circuit joined the Eighth Circuit and specifically held that a Section 371 conspiracy or conspiracy to hinder or obstruct the IRS and to commit substantive tax offense charges did not involve the same willfulness charge required by *Cheek*. *Accord, United States v. Jackson, supra*, 33 F.3d 886, 870-871 (7th Cir. 1994).

The Sixth Circuit has also laid down a special rule in tax conspiracy cases that does not conform to the Cheek standard of willfulness for substantive tax offenses. In *United States v. Sabino*, 274 F.3d 1053, 1073 (6th Cir. 2001), the court concluded that each conspirator in a section 371 conspiracy to commit tax offenses "need not" be "aware of the criminality of their objective" but it does require the government to "show that they knew of the liability for federal taxes," (quoting from *United States v. Collins*, 78 F.3d 1021, 1037 (6th Cir. 1996)).

In upholding the trial court's jury instruction with respect to the conspiracy, the Third Circuit in this case has aligned itself with the Sixth, Seventh and Eighth Circuits. But as the Second Circuit in *Regan* has recognized, willfulness is an essential element of the Section 371 conspiracy to commit tax

offenses and to hinder and obstruct the IRS. Accordingly, the *Cheek* standard should be fully applicable.

3. There is, moreover, a second conflict of decisions that was created by the court below. As we have pointed out, (*supra*, p. 10), the trial court refused to instruct the jury that Petitioner claimed to have relied upon the advice of his tax professional in making sales of fuel oil to the other defendants on a tax-free basis. This professional certified public accountant had advised Petitioner that Petitioner could rely upon the 637 licenses of Kings and PetroPlus in making sales to them on a tax-free basis. Indeed, it was that professional who established the procedures necessary to ensure compliance with the tax laws. Petitioner's substantial defense was his claimed reliance upon the advice of his CPA. Such advice is a critical component in judging a person's conduct under the tax laws.

The analysis necessarily begins with *Mathews v. United States*, 485 U.S. 58 (1988), where this Court held that any time a defendant raises an affirmative theory of his defense, he is entitled to a jury instruction on that issue. Other such affirmative defenses include, among others: (1) coercion or duress, *United States v. Bailey*, 444 U.S. 394 (1980); (2) insanity, 18 U.S.C. § 17; and (3) acting under the influence of drugs or alcohol, *Hopt v. People*, 104 U.S. 631, 633-34 (1881). This Court has never held that good-faith reliance on the advice of a tax professional (accountant/attorney) is such an affirmative defense, which once raised in a criminal tax case, must be explained to the jury and disproved beyond a reasonable doubt.

In *Williamson v. United States*, 207 U.S. 425, 453 (1908), this Court held that the trial court's instruction on the defense of reliance on the advice of counsel more than protected the defendant's rights without ruling on whether such instructions were necessary. *Williamson* involved a criminal fraud charge and was not a criminal tax case. Since *Williamson*, the courts

of appeals have held that reliance on the advice of a professional (attorney/accountant) is not a defense to a variety of non-tax criminal charges.[9] In *United States v. Boyle*, 469 U.S. 241, 251 (1985) this Court rejected reliance on professional advice as a defense to a civil late filing penalty. Nevertheless, the Court observed that good faith reliance upon a tax professional could absolve a taxpayer of the civil negligence penalty. As the Court stated (emphasis in original; citations omitted):

> When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place. "Ordinary business care and prudence" do not demand such actions.

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[9] *United States v. Remine*, 967 F.2d 754 (2d Cir. 1992) (not a defense to criminal contempt). *United States v. Poludniak*, 657 F.2d 948, 958-59 (8th Cir. 1981), *cert denied*, 455 U.S. 940 (1982) (not a defense except when a bona fide legal question is at issue). In *SEC v. Alliance Leasing Corp.*, 2002 WL 10482 (9th Cir. 2001) (not a defense to scienter in a federal securities fraud action.) *United States v. Irwin*, 546 F2d 1048, 1053 (3d Cir. 1976), (refusal to obey a draft induction order). *See also, United States v. Mercado*, 478 F.2d 1108 (2d Cir. 1973); *United States v. Hayes*, 535 F.2d 479, 481 (8th Cir. 1976); (alleged receipt of a firearm by a felon); *United States v.* Thaggard, 477 F.2d 626, 632 (5th Cir. 1973) (gambling charge). *In re Mascolo*, 505 F.2d 274, 277 (1st Cir. 1974), (perjury or false oath charge in bankruptcy case). *United States v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976) (record piracy and copyright infringement.)

However, the Court has never ruled whether and to what extent the defense of good-faith reliance on a tax professional must be given to the jury in a criminal tax case.[10]

It is therefore not surprising that the courts of appeals are in disarray as to whether and in what circumstances the good-faith reliance on a tax professional's advice requires additional explicit instructions beyond the *Cheek* willfulness instruction. The difference among the circuits turns in part on the critical question of whether such an affirmative defense is the equivalent of a simple good faith defense. Eight circuits have held that a simple good faith defense (without testimony as to advice and reliance) requires no such additional specific instruction. In the view of those courts, a finding of specific intent necessarily excludes a finding of good faith.[11] In contrast, the Fifth, Eighth and Tenth Circuits, however, have held that an additional instruction on a general good faith defense is required. *United States v. Fowler*, 735 F.2d 823, 828 (5th Cir. 1984); *United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir. 1985); and *United States v. Hopkins*,

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[10] Although the quoted statement from *Boyle* is *dicta*, it is universally accepted as the standard governing the civil negligence penalty where the taxpayer, and not the government (as here), bears the burden of proof. The courts of appeals have uniformly invoked the passage set out above as a standard for measuring reasonable cause for purposes of the negligence penalty where, as here, a taxpayer seeks advice on a matter of tax law. See, *e.g.*, *Chamberlain v. Commissioner*, 66 F.3d 729, 733 (5th Cir. 1995)

[11] *See, United States v. Zehrbach*, 47 F.3d 1252, 1261 (3d Cir.), (*en banc*), *cert. denied.*, 514 U.S. 1067 (1995) (good faith defense is superfluous in a bankruptcy fraud case); *United States v. Sirang*, 70 F.3d 588, 593 (11th Cir. 1995); *United States v. Gross*, 961 F.2d 1097, 1102 (3d Cir. 1992); *United States v. McElroy*, 910 F.2d 1016, 1025-26 (2d Cir. 1990); *United States v. Dockray*, 943 F.2d 152, 155 (1st Cir. 1991); *United States v. Rochester*, 898 F.2d 971, 978-979 (5th Cir. 1990); *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), *cert. denied*, 474 U.S. 925 (1985) (White and Brennan, JJ, dissenting); *United States v. McGuire*, 744 F.2d 1197, 1201-1202 (6th Cir. 1984); *United States v. Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

744 F.2d 716, 718 (10th Cir. 1984) (*en banc*). The more specific instruction on good faith "directs the jury's attention to the defense of good faith with sufficient specificity to avoid error." *Casperson, supra*, 773 F.2d at 223.

Here, the Third Circuit in the decision below equated Petitioner's reliance on the advice of his CPA to a simple good-faith defense and affirmed without further explanation. But the affirmative defense of a good-faith reliance on an accountant's advice in a criminal tax case is far more than a simple good faith defense. As this Court explained in *Boyle*, an individual is expected to rely on the advice of expert professionals to guide them in areas of studied complexity, particularly the tax code.

The rule that good-faith reliance on a professional adviser establishes the reasonableness of the taxpayer's conduct and relieves the taxpayer of the negligence penalty is entirely appropriate. Indeed, in the absence of such a rule, only those taxpayers with the substantial time and resources necessary to investigate the tax consequences of particular transactions themselves would be able to engage in business. *Heasley v. Commissioner, supra*, 902 F.2d at 380, 383-384 (5th Cir. 1990). The analysis of the *Boyle* ruling provides an instructive guidepost for the resolution of the question presented. See *Cheek v. United States, supra*, p. 208 (Scalia, J., concurring in the judgment).

The Second, Fourth, Fifth, Sixth and Ninth Circuits regard such a good-faith reliance on the advice of a tax professional as an affirmative defense that is separate and distinct from a simple good-faith defense; therefore, an instruction explaining the defense is required whenever the defense is raised. *United States v. Anshen*, 993 F.2d 884 (9th Cir. 1993) (reported at 1993 WL 164657); *United States v. Duncan*, 850 F.2d 1104, 1117-1119 (6th Cir. 1988); *Bursten v. United States*, 395 F.2d 976, 981 (5th Cir. 1968); *Strauss v. United States*, 376 F.2d 416 (5th Cir. 1967);*United States v. Mitchell*,

795 F.2d 285, 288 (4th Cir. 1974); *United States v. MacKenzie*, 777 F.2d 811, 820 (2d Cir. 1985).[12] Other circuits have held that it is not necessary to give an instruction explaining the good-faith reliance on the advice of a tax professional even when it has been raised by testimony in the defense case. In those circuits, the courts have relied on the adequacy of the *Cheek* willfulness instruction to encompass the defense. Since *Cheek* now requires an expanded willfulness instruction, the Seventh Circuit has concluded that such expansive instructions on willfulness obviate the need for specific instructions on the affirmative good-faith reliance defense. In *United States v. Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992), the court held that the *Cheek* instruction "necessarily encompassed the good-faith reliance on accountants advice defense.") In *United States v. Becker, supra*, 965 F.2d 383, 388 (7th Cir. 1992), *cert. denied*, 507 U.S. 971

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[12] Within the circuits that require a specific instruction relating to reliance on the advice of a tax professional, there is a divergence of authority as to whether the trial court must first determine that the defendant has presented adequate evidence of each element of such a defense to warrant the court's instruction to the jury. Some circuits have held that the trial court may refuse the instruction if it believes that there is inadequate evidence as to any one of the elements of such a defense. *E.g.*, *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994); *United States v. Sarno*, 73 F.3d 1470 (9th Cir. 1995); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980); *United States v. Masat*, 948 F.2d 923 (5th Cir. 1991); *United States v. Head*, 697 F.2d 1200, 1212 (4th Cir. 1982).

But given this Court's ruling in *Mathews v. United States, supra*, 485 U.S. 58, that the trial court is required to present every claimed affirmative defense to the jury, it should likewise be a jury question whether or not the elements of the defense have been satisfied. *E.g.*, *United States v. Duncan, supra*, at 1117-18. *United States v. Phillips*, 217 F.2d 435, 442 (7th Cir. 1954); *United States v. Platt*, 435 F.2d 789 (2d Cir. 1970). Those courts that have held otherwise have not specified the quantum of evidence necessary to adequately raise the elements of the defense before the defense must be submitted to the jury.

(1993),[13] the Seventh Circuit expressed the view that a *Cheek* instruction appropriately "focus[es] the jury's attention on whether the defendant had a good-faith belief he was acting lawfully." *Id. Accord, United States v. Kelley*, 864 F.2d 569, 573 (7th Cir. 1989). The Third Circuit has now joined the Seventh Circuit in this regard in its opinion in this case. The Eighth Circuit has taken an intermediate but similar approach. In *United States v. Poludniak*, 657 F.2d 948, 959 n.9 (8th Cir. 1981), that court stated:

> The advice of counsel issue is appropriate only in a limited class of cases in which willful action is an essential element and legal problems are present. "A defendant is entitled to this instruction only if his proposed conduct presents a substantial legal problem so that he requires legal advice in resolving it." Devitt & Blackmar, Federal Jury Practice and Instructions § 14.12 (3d ed. 1977).

There are, moreover, significant differences among the circuits as to how the jury should regard the evidence of the good-faith reliance on a tax professional's advice. Some courts have approved instructions that such good-faith reliance is a complete defense,[14] while other decisions have suggested it is an element to be considered when the jury determines the issue of willfulness.[15] In *United States v. Conforte, supra*, 624 F.2d 869, the Ninth Circuit held that (1) the reliance must be made in good faith; (2) the advice must be obtained after full disclosure of all facts; and (3) the facts

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[13] Prior to *Cheek*, the Seventh Circuit had not required the willfulness instruction set forth in *Cheek*. *See United States v. Whyte*, 699 F.2d 375 (7th Cir. 1983). *United States v. Phillips, supra*, 217 F.2d at 442.

[14] E.g., *United States v. Michaud*, 860 F.2d 495, 500 (1st Cir. 1988); *Bursten v. United States*, 395 F.2d 976, 981-82 (5th Cir.).

[15] E.g., *United States v. Duncan*, 850 F.2d 1104, 1117-18 (6th Cir. 1988); *Dan River v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983); *United States v. Claiborne*, 765 F.2d 784, 798 (9th Cir. 1985).

must relate to the advice obtained. In *United States v. Sarno, supra*, 73 F.3d at 1488, that court indicated that the advisors must be fully informed and independent.

In the authorized post-argument submissions to the court below, the government sought to justify the trial court's refusal to give such instructions on the grounds that "Pedroni did not request such charges and that Pedroni failed to make full disclosure to his accountant. The district court did not refuse the requested instructions on these bases. Instead, it stated that the law did not require that the requested instructions be given. (A2608-09). The undisputed evidence demonstrated that Petitioner made full disclosure to his accountant and more importantly that it was the accountant who made the tax decisions and judgments and recommended the policies and procedures that were put in place. (*E.g.*, A2520-25, 2503). Petitioner relied on his accountant completely, affirmed the implementation of the procedures, and never countermanded him in these respects. (A2524).

In sum, this Court has never specifically held that reliance on the advice of a tax professional is a defense that requires a jury instruction in a criminal tax case. Accordingly, this case is an appropriate vehicle for this Court to resolve the conflict among the circuits. By resolving this conflict, the Court can provide necessary guidance to the federal trial courts whether, and in what circumstances, a defendant in a criminal tax case is entitled to a specific jury instruction that he claimed reliance on the advice of a tax professional.

CONCLUSION

The Petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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August 15, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5182
(D.C. Crim. No. 95-cr-003 8 8-5)

UNITED STATES OF AMERICA

v.

RICHARD PEDRONI,

Appellant

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and COWEN*, *Circuit Judges* and RESTANI**, *Judge*, United States Court of International Trade

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Chief Judge Becker would grant rehearing

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* As to panel rehearing only.

** The Honorable Jane A. Restani, Judge, United States Court of International Trade, who sat by designation, as to panel rehearing only.

BY THE COURT,

/s/ Robert E. Cowen
Circuit Judge

Dated: May 30, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5182

UNITED STATES OF AMERICA

v.

RICHARD PEDRONI,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 95-cr-00388-5)
District Judge: Hon. Joseph E. Irenas

Argued March 7, 2002

Before: SCIRICA and COWEN, Circuit Judges, RESTANI*, Judge, United States Court of International Trade

JUDGMENT

This cause came on to be heard on the record from the United States District 16 Court for the District of New Jersey and was argued on March 7, 2002. On consideration whereof, it is now here ordered and adjudged that the judgment of the District Court entered on March 8, 1999, be and the same hereby is affirmed. All of the above in accordance with the opinion of this court.

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED:

Certified as a true copy and issued in lieu of a formal mandate on June 7, 2002.

Teste: [Illegible]

Clerk, U. S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed April 18, 2002]

No. 99-5182

UNITED STATES OF AMERICA

v.

RICHARD PEDRONI,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 95-cr-00388-5)
District Judge: Hon. Joseph E. Irenas

Argued March 7, 2002

Before: SCIRICA and COWEN, *Circuit Judges*, RESTANI*, *Judge*, United States Court of International Trade

OPINION

COWEN, *Circuit Judge*

Richard Pedroni was found guilty of violating 18 U.S.C. § 371 by conspiring to defraud the United States, and to commit tax evasion (in violation of 26 U.S.C. § 7201), wire fraud on the State of New Jersey (in violation of 18 U.S.C. § 1343), and money laundering (in violation of 18 U.S.C.

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

§ 1957). He was acquitted on all other counts. The District Court sentenced Pedroni to 37 months and ordered him to pay $500,000 in restitution. He challenges the sufficiency of the evidence to support his conviction, some of the evidentiary rulings and jury instructions, as well as his sentence. We will affirm.[1]

I.

Pedroni and his coconspirators participated in a "daisy chain" scheme to evade excise taxes on the sale of certain kinds of fuel. The elements of such schemes have been detailed sufficiently elsewhere. *See, e.g., United States v. Morelli*, 169 F.3d 798, 801 (3d Cir.1999), cert. denied, 528 U.S. 820,120 S.Ct. 63 (1999) (citations omitted). From 1989 until at least 1993, Pedroni operated as the president of Pedroni Fuels, a fuel supply company operating at the top of the daisy chain. We will add further factual detail below as it becomes necessary to the legal discussion.

II.

A. Sufficiency of the Evidence

Pedroni first challenges the sufficiency of the evidence to support his conviction. When reviewing the sufficiency of the evidence to sustain a conviction, we must ask whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt, viewing the evidence in the light most favorable to the government. *See United States*

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[1] Currently before this Court are four appeals arising from the same trial, of which Pedroni's appeal is one. *See United States v. Enright*, No. 99-5144; *United States v. Pedroni*, 99-5182; *United States v. Kararnanos*, No. 99-5212; *United States v. Erlikh*, No. 99-5281. We granted counsel leave to file oversized briefs and ordered that there be no repetition of issues in the briefs. To the extent issues in this Memorandum Opinion apply to any or all of the other three Appellants in this case, we deem the Appellants' arguments to be without merit and affirm the Appellants' convictions and sentences.

v. Veksler, 62 F.3d 544, 551 (3d Cir.1995) (citations omitted). Count One of the Superseding Indictment charged the conspirators with a multiple-object conspiracy to defraud the United States and to commit tax evasion, wire fraud on the State of New Jersey, and money laundering. The Government was required to prove three elements: "(1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objectives, and (3) an intent on the part of the conspirators to agree, as well as to defraud the United States" or to commit an underlying offense, 608 F.2d 950, 955-56 (3d Cir.1979). Pedroni challenges the sufficiency of the first and third elements, arguing that he had no actual knowledge of the illegal objective of the conspiracy nor the requisite intent required.

We are satisfied that a rational finder of fact could conclude beyond a reasonable doubt that the Government met its burden of proof. A jury could rationally infer that Pedroni had actual knowledge of the conspiracy, and that he intended that excise taxes would not be paid on the fuel Pedroni supplied to the daisy chain. For example, Pedroni stock-transferred fuel into Petro Plus' account at the terminal despite invoicing the fuel to a middle company in the chain. He called Kings to determine which company to invoice for the fuel, and it was Kings (and not Petro Plus) that paid Pedroni for the fuel before Pedroni even sent invoices for the middle companies to Kings. When documents and certification were lacking, Pedroni called personnel at Kings, instead of calling the actual purchaser, to give that particular purchasing company an opportunity to provide correct documentation. It did not matter that Pedroni sold to middle companies in the daisy chain that had 637 Licenses (making the initial transactions tax-exempt) because Pedroni clearly knew that he was in effect selling to PetroPlus and that taxes were not being payed along the chain. The record reflects numerous examples of similar deceptions. It is apparent from

the record that the trial provided sufficient evidence from which a rational jury could find the essential elements of the offense beyond a reasonable doubt.

B. Jury Instructions

Pedroni argues that the District Court erred when it did not deliver a charge which included instructions on good-faith defense, willfulness, multiple conspiracy, missing witness, and unity of purpose instructions. Additional error is alleged because the District Court did not instruct the jury that each element must be found unanimously and advised the jury to disregard the evidence that Pedroni lacked a stake in the venture. "We will reverse the [D]istrict [C]ourt's denial to charge a specific jury instruction only when the requested instruction was correct, not substantially covered by the instructions given, and was so consequential that the refusal to give the instruction was prejudicial to the defendant." *United States v. Phillips*, 959 F.2d 1187, 1191 (3d Cir.1992). In determining whether the District Court stated the appropriate legal standards in its charge, our review is plenary. *United States v. Johnstone*, 107 F.3d 200, 204 (3d Cir. 1997). The jury charge must clearly articulate the legal standards at issue and be structured to avoid confusion, we examine the charge in its entirety. *Id.*

We have previously made clear that a District Court's failure to give a good-faith defense instruction does not constitute an abuse of discretion, so long as the charge included detailed instructions on the elements of the crime. Gross, 961 F.2d at 1103 ("[A] jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully."). Consistent, with our practice to review the entire jury charge as a whole, the record is clear that the District Court adequately charged the jury on willfulness. It was not in error to refuse to charge the defense of good faith.

As to the failure to charge on multiple conspiracies, the District Court did instruct the jury that the "first element for you to determine is whether the conspiracy charged in Count One existed" and that "[i]n order to find a defendant guilty of conspiring to defraud the United States, you must find that he was a participant in the scheme to defraud the United States set forth in the Indictment, and not some other scheme." App. at 627, 630. The District Court further instructed the jury that it could not consider whether a defendant was a member of the conspiracy unless it found that "the evidence shows that the conspiracy charged in Count One existed." App. at 633. The charge, viewed in its entirety, substantially covered the instruction Pedroni argues should have been included. *See, e.g.*, Phillips, 959 F.2d at 1191.

Pedroni argues that the District Court should have given a missing witness instruction because the government chose not to call three of its cooperating witnesses. It is clearly established precedent in this Circuit that a missing witness instruction is not appropriate when the witness is available to both the defense and the prosecution. *United States v. Busic*, 587 F.2d 577, 586 (3d Cir.1978), rev'd on other grounds, 446 U.S. 398,100 S.Ct. 1747 (1980). Pedroni does not assert that these three witnesses were not available to him.

Pedroni's argument that the District Court erred by failing to charge the jury with a unity of purpose likewise fails. The District Court instructed the jury that it had to find "'a unity of purpose' or a 'common design' to do something that the law forbids." App. at 631. This more than substantially covered Pedroni's proffered additional (and therefore unnecessary) instruction.

Pedroni argues that the District Court failed to inform the jury that each element of the offenses had to be found unanimously. Again, reviewing the jury charge in its entirety, the District Court adequately charged the jury. The District Court instructed that the jury "must be unanimous as to which

one of the objects of the conspiracy the defendant agreed to pursue," App. at 627-28, and that the jury "verdict must be unanimous." App. at 659. The jury was properly charged.

Pedroni also takes issue with the instructions to the jury that it should disregard evidence that Pedroni lacked a stake in the venture. We have previously held that the government need not prove "that each conspirator expected to benefit from the conspiracy" in order to support a conspiracy conviction. *United States v. Shoup,* 608 F.2d 950, 957 (3d Cir.1979). The instruction was correct.

C. Undercover Operation

Pedroni argues that the Government's payment of cash "bribes" to Pedroni's broker, Robert Recek, induced Pedroni to sell fuel to the Government's undercover business. The record reveals that in May of 1991, the Government established an undercover business. Pedroni became the undercover business' first supplier. The undercover agent initially secured supplies from Pedroni through Pedroni's broker, Recek. In addition to the normal broker's fee, the undercover business payed Recek an additional .5¢ per gallon for every gallon of fuel secured from Pedroni.

Whether the Government's conduct in running the undercover operation was so outrageous as to violate Pedroni's due process rights is a legal question over which our standard of review is plenary. *United States v. Driscoll,* 852 F.2d 84, 85 (3d Cir.1988). We have expressed the view that, "to the extent a government misconduct defense distinct from entrapment is available, it 'must be predicated on intolerable government conduct which goes beyond that necessary to sustain an entrapment defense.'" *Id.* at 86 (citing *United States v. Jannotti,* 673 F.2d 578, 606 (3d Cir.1982) (en banc), *cent. denied,* 457. U.S.1106, 102 S.Ct. 2906 (1982)). We reject Pedroni's contention that the undercover government business and agent, with the help of Recek, rose

to a level that violated Pedroni's due process rights. The Government did not initiate the criminal activity and Pedroni actively and willingly participated in it. *See, e.g., United States v. Twigg*, 588 F.2d 373 (3d Cir.1978) (government approached defendant and supplied all essential material and equipment for methamphetamine production); *United States v. West*, 511 F.2d 1083 (3d Cir. 1975)(government suggested narcotics sale and provided source of the supply for the sale and arranged the sale to another undercover agent).

D. Expert Witnesses at Trial

Pedroni asserts that the District Court erroneously permitted three Government withnesses to offer expert opinions that Pedroni was a part of the criminal conspiracy. A decision to admit expert testimony is reviewed for abuse of discretion. *United States v. Gibbs*, 190 F.3d 188,211 (3d Cir. 1999), *cert. denied*, 528 U.S. 1131, 120 S.Ct.969 (2001) (citation omitted). The trail judge is given "broad discretion" to admit or exclude such testimony, based upon whether it is helpful to the of fact. *Id.* (citing Fed.R. Evid.702).

The three witnesses are Malcolm Fox, Paul Malloy, and Steven Bursey. As an initial matter, the Government did not offer Fox as expert witness and the District Court did not allow Fox to testify as an expert. As a lay witness, Fox was allowed testify to opinions and inferences if they were "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge with the scope of Rule 702." Fed R. Evid. 701. A review of the record reveals that Fox's testimony fell within the permissible parameters of Rule 701. We find no abuse of discretion concerning the Fox testimony.

Malloy an IRS agent, testified about tax returns and financial transactions, the taxing structure as it pertained to motor fuel excise tax, and taxes and the methods of evasion

or tax fraud (as elicited on the record by Pedroni's counsel after the Government presented evidence concerning Malloy's qualifications). Bursey, a former FBI Special Agent, testified about his experiences as an undercover agent operating the undercover business to which Pedroni sold fuel on several occasions.

Our review of the record has failed to uncover any evidence where these two witnesses explicitly opined about Pedroni's part in the conspiracy. Gibbs, 190 F.3 d at 212 ("Where an expert in a criminal case has not explicitly testified about a defendant's intent, courts [are] reluctant to exclude the expert's testimony under Rule 704(b)." (emphasis added)). Many of the passages from the transcript challenged by Pedroni are statements made by the witnesses in response to questions posed on cross-examination. The District Court did not abuse its discretion in allowing these witnesses to testify.

E. Evidence of Other Conspiracies and Other Charges

Count 38 of the Superseding Indictment charged one of Pedroni's coconspirators, Daniel Enright, with a conspiracy to extort money from two other coconspirators. Pedroni argues that this Count, along with other charges in the Indictment, had nothing to do with him and that he was prejudiced by the District Court's decision to deny his motion for severance. The "other charges" in the Indictment include: Count 39 which charged Enright and Wasserstrom with committing a currency reporting violation; evidence concerning Enright's personal returns for 1990 through 1993; evidence of excise tax evasion occurring after Pedroni stopped providing fuel to the daisy chain; evidence of wire fraud and money laundering charges involving payments to different suppliers; and evidence that Enright received millions of dollars of income from his participation in the conspiracy.

Rule 14 of the Federal Rules of Criminal Procedure states:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or other defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

The burden of showin 553, 568 (3d Cir.1991). Our review of the District Court's denial of the severance motion requires that we "first determine from the record as it was when the severance motions were made, what trial developments were then reasonably foreseeable, and in that light decide whether the court abused its discretion denying severance." *Id.* If we determine that the District Court abused its discretion, then we must determine whether the denial caused trial prejudice, asking "whether the jury could have been reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence." *Id.*

We hold that the District Court did not abuse its discretion in denying Pedroni's Rule 14 severance motion. Severing Pedroni's trial was not required, even if some potential for prejudice might be associated with evidence of the Enright extortion conspiracy and other charges in the Indictment unrelated to Pedroni. "Prejudice should not be found in a joint trial just because all evidence adduced is not germane to all counts against each defendant." *Id.* In addition, the District Court instructed the jury to "carefully weigh the evidence relating to each defendant and each charge," which it clearly did when we observe it convicted Pedroni on only one count and acquitted him on all remaining counts. We see no abuse of discretion.

F. Other Allegedly Prejudicial Evidence

Pedroni raises a number of challenges to the order of the District Court's to admit evidence on and concerning tapes made by undercover agents relating to the undercover business. Pedroni argues that the evidence should have been excluded under Rule 404(b) of the Federal Rules of Evidence.

Federal Rule of Evidence 404(b) is a "codification of the common law prohibition against the admission of evidence of prior crimes, wrongs, or other acts relevant solely to prove the defendant's 'general criminal predisposition to do wrong.'" *United States v. Scarfo*, 850 F.2d 1015,1019 (3d Cir.1988) (citation omitted) (emphasis added). The rule prohibits the admission into evidence of extrinsic acts intended to prove a defendant's propensity for crime or to suggest to the jury unfavorable inferences reflecting on his character. But evidence that bears on a relevant issue in a case, though possessing the potential to damage the defendant's cause, "is not inadmissible for that reason alone." *Id.* at 1018-19. If the evidence is offered for another proper reason, "the same evidence of other crimes or acts is subject only to the ordinary limitations under Rules 402 and 403," which include undue prejudice *Id.* at 1019. Intended as a "rule of inclusion," the possible uses of other crimes evidence has been used to prove such things as: motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, background information, parties familiarity with one another, concert of action, parties continuing relationship, and to assist jurors in understanding defendant's role in the scheme. *Id.* (citations omitted). Before admitting evidence of other acts under Rule 404(b), the District Court must ask, "Whether that evidence is probative of a material issue other than character." *United States v. Huddleston*, 485 U.S. 681, 685,108 S.Ct. 1496,1499 (1988). Under Rule 403, the District Court must "appraise the genuine need for the challenged evidence and balance that necessity against the risk that the information will influence

the jury to convict on improper grounds." Scarfo, 850 F.2d at 1019. Our review of a District Court's decision to admit or exclude evidence is for abuse of discretion, "and such discretion is construed especially broadly in the context of Rule *United States v. Mathis*, 264 F.3 d 321, 326-27 (3d Cir. 2001).

As the record clearly reveals, the District Court performed the balancing test mandated under Rule 403 and admitted those portions of the topes which it found were not unduly prejudicial to Pedroni. Despite Pedroni's challenges to the contrary, the District Court gave proper and timely limiting instructions with regard to the challenged evidence which it admitted. The District Court also conducted a careful review of the tapes, and excluded those portions of the tapes which it found excludable under Rule 403. We find no abuse of discretion.

G. Restitution

Pedroni argues that the District Court improperly ordered him to pay $500,000 in restitution. We review the appropriateness of a District Court's award of restitution for abuse of discretion. *United States v. Simmonds*, 235 F.3d 826, 829 (3d Cir. 2000).

As the Government aptly points out, the District Court could have ordered up to $74 million dollars in restitution, given that the total loss was estimated at $132 million and the loss associated with the charges for which Pedroni was acquitted totaled almost $58 million. In such a light, we find no abuse of discretion in the District Court's (rather generous) restitution order.

III.

We have thoroughly reviewed all the arguments presented by Pedroni in his submissions to this Court, and those presented at oral argument, and find no basis to disturb the

conviction or the sentence imposed by the District Court. The judgment of the District Court entered on March 8, 1999, will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Robert E. Cowen
United States Circuit Judge

APPENDIX B

18 U.S.C. 371—Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U.S.C. 7201—Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

18 U.S.C. 1343—Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1957—Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as

appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney general.

(f) As used in this section—

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956 (c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956 (c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

OPPOSITION

BRIEF

OCT 30 2002

OFFICE OF THE CLERK

No. 02-240

In the Supreme Court of the United States

RICHARD PEDRONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury instructions allowed the jury to find petitioner guilty of conspiracy to commit tax evasion without finding that petitioner voluntarily and intentionally violated a known legal duty.

2. Whether the evidence was sufficient to require an instruction on petitioner's defense of good-faith reliance on the advice of a tax professional.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-16a) is not published in the Federal Reporter, but is reprinted at 45 Fed. Appx. 103.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2002. Pet. App. 5a. A petition for rehearing was denied on May 30, 2002. Pet App. 1a-2a. The petition for a writ of certiorari was filed on August 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial, petitioner was convicted on one count of conspiracy to defraud the United States and to commit tax evasion, 26 U.S.C. 7201, wire fraud, 18 U.S.C. 1343, and money laundering, 18 U.S.C. 1957, in violation of 18 U.S.C. 371. Pet. App. 5a-6a. He was sentenced to 37 months of imprisonment and was ordered to pay restitution of $500,000. Pet. App. 6a.

1. a. Petitioner and his co-conspirators participated in a "daisy chain" scheme to evade excise taxes on the sale of certain kinds of fuel, including diesel fuel.[1] Petitioner operated Pedroni Fuels, a fuel supply company. During the execution of the scheme, Pedroni Fuels sold diesel fuel to PetroPlus Oil (PetroPlus), a company that bought and sold motor fuel and that was operated by petitioner's co-defendant, Daniel Enright. PetroPlus bought the fuel in transactions that required it to pay excise taxes when it sold the fuel for highway use in motor vehicles. Petitioner and the other conspirators, however, set up an elaborate scheme involving the creation of paperwork that made it appear that the taxes owed had been paid by other entities in "daisy chains" of companies between Pedroni Fuels and PetroPlus. None of those entities in fact had paid the taxes. Pet. App. 6a-7a; Gov't C.A. Br. 3.

The scheme originated with an agreement between Enright and representatives of Kings Motor Oils (Kings). Kings purchased, or caused a company Kings

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[1] Petitioner's co-conspirators included Demetrios Karamanos and Daniel Enright, who were tried along with petitioner and convicted of various offenses. Gov't C.A. Br. 2. Enright's and Karamanos's convictions were affirmed by the court of appeals, and Enright and Karamanos (joined by petitioner) have filed petitions for a writ of certiorari (Nos. 02-228 and 02-320).

controlled to purchase, tax-free fuel for delivery to PetroPlus. Pedroni Fuels was one of Kings's suppliers and, on a monthly basis, Pedroni Fuels was informed of the amount of fuel Kings was to provide to PetroPlus. Petitioner would call Kings in order to determine which company in the daisy chain should be invoiced for the fuel supplied by petitioner to PetroPlus. Gov't C.A. Br. 3-4, 6-7.

Petitioner insisted that companies he invoiced have an IRS certification form (Form 637) authorizing them to engage in tax-free sales, which would give the appearance that the conspirators "were doing legitimate business." C.A. App. A2074. If petitioner reviewed documents and certifications for a company in the daisy chain involved in one of his transactions and found the documents to be lacking, petitioner contacted Kings, not the actual purchaser, and requested that Kings identify another company with adequate documentation. Although Pedroni Fuels nominally sold the fuel to Kings-controlled companies, Pedroni Fuels typically transferred the fuel directly from its account at a terminal to PetroPlus's account at the terminal. Thus, while petitioner arranged to have companies in the daisy chain invoiced for the fuel, he knew that the real purchaser of the fuel was PetroPlus. Gov't C.A. Br. 6-9.

Kings, or a company controlled by Kings, "sold" the fuel down through the daisy chain of companies and created paperwork falsely representing the fuel as fuel on which taxes had been paid by the time of the eventual sale to PetroPlus. PetroPlus then sold the fuel to legitimate retailers for a price that included the amount of the tax that supposedly had been paid. In approximately 78 transactions between January 11, 1990, and June 24, 1992, Pedroni Fuels supplied PetroPlus, through the daisy chain scheme, with roughly 47

million gallons of fuel on which over $9 million in federal and state excise tax was not paid.[2] Gov't C.A. Br. 4, 9.

b. On August 3, 1995, a grand jury in the District of New Jersey returned an indictment charging petitioner and 24 co-defendants with tax evasion, wire fraud, money laundering, and conspiracy. On August 27, 1996, the grand jury returned a superseding indictment. On June 19, 1998, following a nine-month trial, the jury found petitioner guilty on one count charging him with conspiracy to defraud the United States and to commit tax evasion, 26 U.S.C. 7201, wire fraud, 18 U.S.C. 1343, and money laundering, 18 U.S.C. 1957, in violation of 18 U.S.C. 371. Petitioner was acquitted on the other counts. Pet. App. 5a-6a; Gov't C.A. Br. 2.

2. On appeal, petitioner challenged, *inter alia*, the sufficiency of the evidence to support his conviction and certain of the trial court's jury instructions. Pet. App. 6a. After briefing and oral argument, petitioner submitted a letter brief elaborating arguments (1) that the district court failed to properly instruct the jury on "willfulness" in connection with the conspiracy count and (2) that the district court should have given the jury an instruction concerning the defense of good-faith reliance on the advice of an accountant.

The court of appeals affirmed. Pet. App. 5a-16a. In rejecting petitioner's argument that the evidence was insufficient to convict him, the court explained that "[i]t did not matter that Pedroni sold to middle companies in the daisy chain that had 637 Licenses (making the initial transactions tax-exempt) because Pedroni clearly knew that he was in effect selling to PetroPlus and that

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[2] In total, the conspirators evaded over $132 million in federal excise taxes and defrauded the State of New Jersey out of over $11 million in taxes. Gov't C.A. Br. 9.

taxes were not being payed along the chain." *Id.* at 7a. Addressing petitioner's challenges to the jury instructions, the court explained that "a District Court's failure to give a good-faith defense instruction does not constitute an abuse of discretion, so long as the charge included detailed instructions on the elements of the crime." *Id.* at 8a. "Consistent * * * with our practice to view the entire jury charge as a whole," the court concluded, "the record is clear that the District Court adequately charged the jury on willfulness." *Ibid.*[3]

ARGUMENT

1. Petitioner asserts (Pet. 9-10, 11-16) that the court of appeals erred in upholding the district court's jury instructions on "willfulness." That contention lacks merit and does not warrant this Court's review.

According to petitioner, the jury instructions on "willfulness" failed to comply with this Court's decision in *Cheek* v. *United States*, 498 U.S. 192 (1991). Petitioner asserts (Pet. 12-13) that, because one of the alleged objects of the charged conspiracy was tax evasion, the instructions on the conspiracy count should have required the jury to find the element of "willfulness" applicable to the offense of tax evasion. See *Ingram* v. *United States*, 360 U.S. 672, 678 (1959) ("conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself"). Under *Cheek*, the element of "willfulness" under the federal criminal tax statutes means the "voluntary, intentional violation of a known legal duty." 498 U.S. at 200. Petitioner contends (Pet. 13) that the instructions on

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[3] Because the court of appeals' opinion is unpublished, it does not establish binding precedent. See 45 Fed. Appx. at 103.

conspiracy erred in failing to incorporate the words "violation of a known legal duty."

Petitioner's argument is without merit. As petitioner correctly assumes (Pet. 12), the district court's general instruction on knowledge and willfulness applied to the conspiracy count. In fact, the jury instructions on the conspiracy count specifically required finding "a given defendant's knowing and willful participation in" the conspiracy. C.A. App. A633. The general instruction on "knowing and willful" required the jury to determine that "the defendant knowingly and willfully violated the law," and it explained that a "person acts 'willfully' if he or she acts voluntarily and intentionally and with the specific intent or purpose to do something the law forbids or with the specific intent to omit something the law requires him or her to do—in other words, with a bad purpose or evil intent to either disobey or disregard the law." *Id.* at A590.

That language is consistent with this Court's decisions construing the element of willfulness under the criminal tax statutes. This Court, in fact, upheld virtually identical language in *United States* v. *Pomponio*, 429 U.S. 10, 11 (1976) (per curiam). Contrary to petitioner's argument (Pet. 12-13), this Court has not suggested that jury instructions on willfulness must contain the exact words "violation of a known legal duty." That requirement can be conveyed in a number of different ways, see *Bryan* v. *United States*, 524 U.S. 184, 194 & n.17 (1998) (discussing *Cheek* and *Pomponio*); *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), and it was sufficiently captured by the instruction in this case. See *United States* v. *Evangelista*, 122 F.3d 112, 116 (2d Cir. 1997) (upholding substantially similar instruction), cert. denied, 522 U.S. 1114 (1998); *United States* v. *McGuire*, 79 F.3d 1396, 1405-1406

(same), vacated on other grounds, 90 F.3d 107 (5th Cir. 1996). The jury's finding that petitioner acted (C.A. App. A590) "with the specific intent or purpose to do something the law forbids or with the specific intent to omit something the law requires him or her to do—in other words, with a bad purpose or evil intent to either disobey or disregard the law," entailed in the context of this case a determination that petitioner knew that the law required payment of taxes on the motor fuel sales described in the indictment. See *Pomponio*, 429 U.S. at 11-13; *McGuire*, 90 F.3d 1405-1406; *United States* v. *Powell*, 955 F.2d 1206, 1211 (9th Cir. 1992) ("government may prove willful conduct by establishing either: (1) that the defendant acted with a bad purpose or evil motive, *or* (2) that the defendant voluntarily, intentionally violated a known legal duty").[4]

2. Petitioner argues (Pet. 10-11, 16-22) that the district court should have instructed the jury on the defense of good-faith reliance on the advice of a tax

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[4] Because the jury instructions on the conspiracy count required a finding that petitioner acted willfully, this case does not implicate any conflict (Pet. 14-16) on whether the *Cheek* definition of willfulness for a substantive tax offense also applies to conspiracies to commit a substantive tax offense. In any event, there is no conflict. The courts of appeals agree that, where one or more of the charged objects of a conspiracy is a substantive tax offense having willfulness as an element, a willfulness instruction must be given on the conspiracy charge with respect to that object. The decisions described by petitioner as adopting a contrary view (Pet. 15) in fact involve conspiracies to defraud the United States by impeding the Internal Revenue Service, which, unlike conspiracies to commit a substantive tax offense, do not implicate the element of willfulness. See *United States* v. *Cyprian*, 23 F.3d 1189, 1201 (7th Cir.), cert. denied, 513 U.S. 879 (1994); *United States* v. *Derezinski*, 945 F.2d 1006, 1012 (8th Cir. 1991).

professional. That fact-bound contention lacks merit and does not warrant review.

Petitioner, relying on this Court's decision in *Mathews* v. *United States*, 485 U.S. 58 (1988), argues that "any time a defendant raises an affirmative theory of his defense, he is entitled to a jury instruction on that issue." Pet. 16. That is incorrect. *Mathews* explained that, "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense *for which there exists evidence sufficient for a reasonable jury to find in his favor*." 485 U.S. at 63 (emphasis added). In order to be entitled to an instruction on the defense of good-faith reliance on the advice of a tax professional, therefore, the record must contain sufficient evidence for a reasonable jury to conclude that the defendant made a full disclosure of the relevant facts to the professional, that he received and followed advice as to the specific course of conduct in light of those disclosed facts, and that he relied on the professional's advice in good faith. See *Evangelista*, 122 F.3d at 116; *United States* v. *Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir. 1987). None of the decisions relied on by petitioner suggests an obligation to instruct the jury on good-faith reliance even in the absence of sufficient record evidence to support the defense.

There was no evidentiary basis in this case for an instruction on good-faith reliance. Petitioner stresses (Pet. 3-4, 16) that his accountant advised him to make tax-free sales of fuel only to those companies that could verify possession of the proper IRS documentation (a 637 License) permitting the company to engage in tax-free transactions. As the court of appeals explained, however, "[i]t did not matter that [petitioner] sold to middle companies in the daisy chain that had 637 Licenses (making the initial transactions tax-exempt)

because [petitioner] clearly knew that he was in effect selling to PetroPlus and that taxes were not being payed along the chain." Pet. App. 7a. There is no evidence from which a reasonable jury could conclude that petitioner made full disclosures to his accountant of the fact that the sales were in actuality to PetroPlus, of the transfer of fuel directly to PetroPlus's account despite the chain of invoices to middle companies in the daisy chain, or of the "numerous examples" in the record "of similar deceptions." *Ibid.* In addition, no jury could have found petitioner's reliance to be in good faith, given that he papered the transactions with invoices that made it seem that he sold the fuel to other entities in the chain so that PetroPlus would appear to receive the fuel with the taxes having already been paid on it.

Contrary to petitioner's contention (Pet. 10), moreover, the court of appeals did not hold "that the *Cheek* instruction on willfulness obviates the need for a separate instruction on reliance upon advice of a tax professional." Petitioner conflates two different good-faith instructions—a general one on good-faith misunderstanding of the law and a specific one (on which he now relies) concerning good-faith reliance on the advice of a professional. As petitioner correctly explained in his post-argument submission to the court of appeals (Pet. C.A. Supp. Br. 3), the defense of good-faith reliance is "*not simply 'a good faith defense.'*" The court of appeals did not specifically address petitioner's contention that he should have received an instruction on good-faith reliance. Instead, the opinion only addresses the general good-faith instruction, and holds correctly that a separate instruction on good-faith is not necessary when the trial court has adequately instructed the jury

on the element of willfulness. Pet. App. 8a.[5] There is no warrant for this Court to grant review of petitioner's fact-bound claim, which lacks an evidentiary basis and was not specifically addressed by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2002

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[5] In his opening and reply briefs in the court of appeals (Pet. C.A. Br. 39-42; Pet. C.A. Rep. Br. 14-18), petitioner argued that the district court erred in not giving a general good-faith instruction on the conspiracy count. Petitioner mentioned that he relied on his accountant (Pet. C.A. Br. 42 n.10; Pet. C.A. Rep. Br. 14), but he did not develop the argument that the court should have instructed the jury on good-faith reliance on the advice of a tax professional. In his post-argument letter brief, petitioner specifically claimed for the first time in the court of appeals that the district court erred by not instructing the jury on good-faith reliance on the advice of a professional.

(3)

No. 02-240

IN THE

Supreme Court of the United States

RICHARD PEDRONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY MEMORANDUM FOR THE PETITIONER

I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE WHETHER THE *CHEEK* DEFINITION OF WILLINGNESS IS APPLICABLE TO TITLE 18 U.S.C. § 371 CONSPIRACIES TO VIOLATE OR OBSTRUCT THE ADMINISTRATION OF THE TAX LAWS

The government does not, for indeed it cannot, deny that there is a square conflict in the circuits on the question whether the definition of willfulness established by this Court in *Cheek v. United States*, 489 U.S. 192, 201 (1991) applies to criminal tax conspiracy cases. The Second Circuit has held that the defendant in a tax conspiracy case is entitled to jury instructions applying the *Cheek* definition of willfulness. *United States v. Regan*, 937 F. 2d 823, 826-827 (2d Cir. 1991). However, the Seventh and Eighth Circuits—and now the Third Circuit in the decision below—have ruled precisely to the contrary, holding that *Cheek* does not apply to tax and *Klein*-type conspiracy cases. *United States v. Cyprian*, 23 F.3d 1189, 1201 (7th Cir.), *cert. denied*, 513 U.S. 879 (1994); *United States v. Jackson*, 33 F. 3d 866, 871 (7th Cir. 1994); *United States v. Derezinski*, 945 F.2d 1006, 1012 (8th Cir. 1991).

Despite the conflict of decisions on this important question concerning jury instructions in tax conspiracy prosecutions, the government urges (Br. in Opp.6) that this particular case does not warrant plenary review. As the government sees the matter, the conflict is not implicated here because "the jury instructions on the conspiracy count specifically required finding 'a given defendant's knowing and willful participation in' the conspiracy." *Id.*

But the government's contention overlooks the critical defect in the trial court's definition of the essential elements

of the crime of conspiracy. In its instructions, the trial court advised the jury as follows (A623): [1]

> The offense of conspiracy has three essential elements, each of which must be proven beyond a reasonable doubt as to a particular defendant:
>
> First: that two or more persons voluntarily and intentionally entered an unlawful agreement at about the time charged in the Indictment;
>
> Second: that the defendant knowingly and voluntarily became a member of the conspiracy charged;
>
> Third: [requiring] . . . "one overt act."

The foregoing identification of the elements of the offense of conspiracy by the trial court completely omits any reference to "willfulness" as an element of the crime. The elements are of critical legal significance. A jury in a federal criminal case may convict when the government has proven the elements of the offense. *E.g.*, *Richardson v. United States*, 526 U.S. 813, 817 (1999). *Johnson v. Louisiana*, 406 U.S. 356, 369-371 (1972) (Powell, J., concurring); *Andres v. United States*, 333 U.S. 740, 748 (1948). Hence, as the trial court submitted the case to the jury, it was entirely possible for the jury to have convicted Petitioner for conspiracy without *any* proof that he willfully intended to violate the law. Accordingly, Petitioner's conviction for conspiracy cannot in any event stand.

Indeed, the government concedes as much when it states, in an oblique acknowledgment of the error in this case, "The courts of appeals agree that, where one or more of the charged objects of a conspiracy is a substantive tax offense having willfulness as an element, a willfulness instruction must be given on the conspiracy charge with respect to that object." (Br. in Opp. 7, n. 4) Since Petitioner was charged

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[1] "A" references are to the joint appendix in the court of appeals. We have lodged a copy of the joint appendix with the Clerk.

with conspiracy to violate four tax-related objects, including the substantive offense of federal excise tax fraud (Pet. App. 5a),[2] his conviction under such manifestly erroneous jury instructions must be set aside.

Recognizing the essential defect of the trial court's jury instructions with respect to the essential elements of the offense of conspiracy, the government falls back upon the general definitions that the court gave the jury in the preamble of the 122 pages of jury instructions before the description of the elements of the offenses. In these general definitions, the trial court stated (A590):

> A person acts "knowingly" if he acts voluntarily and intentionally, and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to ensure that no one will be convicted for an act done because of mistake or accident, or other innocent reason.
>
> A person acts "intentionally" if he or she acts voluntarily or on purpose, and not because of mistake or accident or other innocent reason. The purpose of adding the word "intentionally" is to ensure that no one will be convicted for an act done because of mistake or accident, or other innocent reason.
>
> A person acts "willfully" if he or she acts voluntarily and intentionally and with the specific intent or purpose to do something the law forbids or with the specific intent to omit something the law forbids or with the specific intent to omit something the law requires him or her to do—in other words, with a bad purpose or evil intent to either disobey or disregard the law.

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[2] All four objects of the 18 U.S.C. § 371 conspiracy violated were tax offenses. The substantive tax offense object was to commit federal excise tax fraud. The *Klein* object was to obstruct the IRS, the mail fraud object was a state tax offense, and the money laundering object was a charge that Petitioner conspired to transport tax fraud proceeds in interstate commerce. (A247-48)

> In determining whether a defendant has acted knowingly and willfully, it is not necessary for the government to establish that he or she knew that he or she was breaking any particular law.

The trial court's general definition of willfulness stands as a disconnected and therefore ineffective appendage in the lengthy overall instructions. As a result, the jury had no frame of reference in which to include the requirement of willfulness in the definition of conspiracy. Hence, the government's suggestion (Br. in Opp. 6) that the element of willfulness "was sufficiently captured by the instructions in this case" is at best disingenuous, or at worst, simply wrong.

The foregoing general definitions were part of the general instructions and guidance for the jury. Thereafter, there were sections of the jury charge devoted to each of the offenses in the indictment, *i.e.*, wire fraud (A595 to 603), money laundering (A604 to 608), federal excise tax evasion (A609 to 20), the Title 18 conspiracy incorporating the four tax-related objectives (A625 to 42), the extortion conspiracy as to the defendant Enright alone (A643 to 49), and the customs violation as to the defendant Enright alone (A649 to 53). The general definitions above were to be used but only in connection with the specific offenses at issue. The fact that a general definition for willfulness was given early in the 122-page legal charge cannot be invoked to save the specific conspiracy instructions which did not include willfulness as an element of the conspiracy.[3]

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[3] The government relies upon the fact that the trial court mentioned "knowing and willful" in the instructions on conspiracy citing A633. During the 25 pages in which the court described a conspiracy, the court stated:

> Rather, the evidence must show both the existence of the conspiracy and a given defendant's knowing and willful participation in it—that he intended to advance a purpose or object of the conspiracy.

Even assuming *arguendo* that the jury was somehow able to connect the trial court's general definition of willfulness with the instructions, 33 pages later on the essential elements of conspiracy, the court's general definition of willfulness did not incorporate the *Cheek* standard. The last clause of the general definition of willfulness suggesting that a defendant need not know what law was involved permitted a guilty verdict without a defendant's knowledge of the applicable tax laws and regulations (*i.e.*, IRS Notice 88-30). This instruction was the very antithesis of the *Cheek* requirement that a defendant violate a *known* legal duty. The complex rules and regulations applicable to licensed "suppliers" of tax-free No. 2 oil who were selling to similarly licensed buyers are not generally known. Indeed, the government has never even identified the legal duty that Petitioner, as a salesman for a supplier of tax-free No. 2 oil, violated by selling tax-free oil to purchasers who were licensed by the IRS to buy tax free. Oil is a commercial commodity. Oil is not contraband like drugs. Sellers of sugar who sold to buyers who later used the sugar to distill alcohol illegally were held not to be criminally liable in *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). By the same token, what legal duty did Petitioner, a seller of a commercial commodity, have that was different from that of a supplier of any other such commodity such as electricity? The government has never identified that legal duty in this case, even when asked to do so directly by the trial court. (*See* Pet. 5-6)

However, on the very next page (A634,) the court essentially vitiated any impact that its use of the word willfully might have had by stating:

> The Government must prove to you that a particular defendant knowingly and intentionally associated himself or herself with the alleged criminal activity.

At the end of the day, such passing references to willfulness were inadequate to cure the court's failure to include willfulness as an element of the offense.

Here, the government seeks to criminalize Petitioner's conduct in the context of a highly technical body of federal excise tax statutes and IRS procedures. Such a prosecution demands that the jury be instructed in accordance with the heightened *Cheek* standard to avoid convicting individuals engaged in apparently innocent activity, *viz*, selling fuel oil. The instructions that obviated the government's need to prove a knowing violation of specific laws and specific legal duties were defective.

At all events, contrary to the government's contention (Br. in Opp. 7, n. 4), a conspiracy to commit a substantive tax offense and a *Klein* conspiracy to obstruct the IRS are equally aimed at the federal taxing authority and both implicate the element of willfulness to violate specific legal duties imposed by the IRS. Hence, the heightened *Cheek* standard is fully applicable to both types of conspiracies. As the Second Circuit reasoned in *United States v. Regan*, *supra*, 937 F. 2d at 827, the conflicting decision the government conspicuously fails to address, tax laws by their very nature, involve a proliferation of complex statutes and regulations. It therefore does not matter whether a defendant is charged with a conspiracy to commit a substantive tax offense or a conspiracy to obstruct the functions of the IRS. Both types of conspiracies are rooted in this highly technical body of complex statutes and regulations which ordinary persons are not presumed to know. *Accord: Ratzlaf v. United States*, 510 U.S. 134, 149 (1994); *Bryan v. United States*, 524 U.S. 184, 194 and nns. 18, 22. Accordingly, both types of conspiracies required proof of a "voluntary, intentional violation of known legal duty." (498 U.S. at 201).

The decision below—holding that the *Cheek* standard does not apply to either type of conspiracy—is squarely at odds with *Regan* as to *Klein*–type conspiracies. The decision below is also at odds with the government's position before this Court, as to conspiracies to commit substantive tax offenses. The manifest conflict among the courts of appeals,

as well as the conflict between the decision below and the government's present position herein (Br. in Opp. at 8, n. 4) warrants plenary review of this case.

II. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE WHETHER A DEFENDANT IN A CRIMINAL TAX CASE IS ENTITLED TO A JURY INSTRUCTION ON HIS AFFIRMATIVE DEFENSE OF GOOD FAITH RELIANCE ON A TAX PROFESSIONAL'S ADVICE

A. The government does not contest the importance of or the frequency with which the issue of good-faith reliance upon the advice of a tax professional arises in criminal tax cases and other federal financial cases. Nor does the government contest that there is a splintering of authority in the courts of appeals as to when and whether a legal instruction setting forth the elements of the affirmative defense of good-faith reliance is necessary.

However, in opposing review by this Court of this question concerning Petitioner's right to such a jury instruction, the government asserts (Br. in Opp. 8) that "there was no evidentiary basis in this case for an instruction on good-faith reliance." The record, however, is precisely to the contrary. The evidence established that Petitioner unquestionably relied upon his CPA, Ron Suppa, who supervised the tax department of Pedroni Fuel for 20 years. Suppa testified without contradiction that he established the tax practices and procedures at Pedroni Fuel and that Petitioner relied upon his advice and adopted his decisions, that all of the tax decisions on the transactions in this case were made by him after review of all necessary documents and appropriate inquiry and that Petitioner never countermanded him. (*See* App. A, *infra*, pp. 1a-11a).[4] Pursuant to Suppa's policies, all of the

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[4] For the convenience of the Court, we have reproduced certain pertinent portions of Suppa's testimony in the Appendix A, *infra*, pp. 1a-11a.

No. 2 oil which was at issue, sold by Pedroni Fuel, was sold to companies that Suppa determined were licensed 637 companies. Therefore, Suppa determined that those sales were to be made tax-free. (App. A, *infra*, pp. 3a-5a, 7a-11a)

B. Furthermore, the government argues (Br. in Opp. 9) that there is no evidence from which a reasonable jury could conclude that Petitioner made "full disclosures to his accountant of the fact that the sales were in actuality to PetroPlus . . . ." But this point is of no legal consequence for two separate reasons.

First and most important, the government's claim that Petitioner failed to make full disclosure to his accountant rests solely upon its hypothesized recharacterization of Pedroni Fuel's sales as sales to PetroPlus, rather than as listed on the Stipulation between the parties. (App. B, *infra*, at pp. 12-13)[5] In the government's view, Petitioner's failure to tell his accountant that the sales were to PetroPlus invalidated his reliance upon the accountant's advice. But the government's after-the-fact legal recasting of the transactions cannot retroactively invalidate Petitioner's reliance on his accountant's advice on the ground of lack of disclosure. A jury should be told to decide the issue whether all material facts were disclosed to the professional adviser, if that issue is contested.[6] The fact that both sides have conflicting legal

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[5] For the convenience of the Court, we have reproduced a Stipulation submitted to the trial court that identified the 78 sales by Pedroni Fuel. Pedroni Fuel was involved in approximately 7 percent (both by volume and number) of the 1,011 total sales at issue over a three-year period. (App. B, *infra*, pp. 12a-13a; *See also* Pet. 2-3 and n. 2) All 78 sales were to entities licensed by the IRS to purchase tax free. (App. A, *infra*, p. 10a and App. B, *infra*, pp. 12a-13a)

[6] The record indicates that disclosure of the material facts to Suppa was not effectively contested at trial by the government. A single government expert supplied any basis for claiming that Pedroni Fuel's sales were sales to PetroPlus rather than those to the companies in the Stipulation. This IRS agent had no excise tax experience prior to his participation in the

theories does not bar the submission to the jury of the defendant's affirmative defense. As a standard treatise has noted:

> Whether [the] Defendant acted in good faith for the purpose of truly seeking guidance as to questions about which [*he*] [*she*] made a full and complete report or disclosure and whether [*he*] [*she*] acted strictly in accordance with the advice received, are all questions for you to determine.

O'Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §919.08 (2000 ed.).

Second, the fact of the matter was that PetroPlus was itself licensed to receive tax-free fuel. (*E.g.*, A2335). Therefore, it was legally irrelevant and irrelevant to Suppa whether the sales were reconstructed after the fact pursuant to the government's legal theories. Transfers of tax-free product to PetroPlus, a licensed company, were totally tax-free from a licensed supplier's viewpoint, (A2225; 2395) as IRS Commissioner Goldberg's spokesman to the oil industry and the draftsman of IRS Notice 88-30 confirmed. (A2557; 2555-6) (*See also* Pet. 4, n. 4). When Petitioner was secretly tape-recorded by government agents, he stated that it did not matter whether sales were to PetroPlus, a licensed company, or to any other licensed company—taxes were simply not involved in sales from Pedroni Fuel's viewpoint. (*E.g.*, A1359). The fact that oil was transferred to the possession of another licensed company was irrelevant to Petitioner's accountant and did not affect his tax decisions or tax advice. The government's cross-examination failed to prove that

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investigation of this case. The agent also conceded that various sales to the companies on the Stipulation were in fact sales to those parties. (A2331). Moreover, three defense experts, including the former IRS spokesman to the oil industry, explained that Petitioner's sales were tax-free as reflected on the records (A. 2550-2551, 2578-2579).

Suppa was unaware of such stock transfers or that they were a material fact to him.

C. Finally, the government argues (Br. in Opp. 10, n.5) that the issue of good-faith reliance on the accountant's advice was not specifically addressed by the court of appeals because Petitioner never developed the argument until a post-argument letter brief. Once again, the government mischaracterizes the proceedings below. There can be no doubt that Petitioner raised these precise issues in the district court and in the court of appeals. In the briefs submitted to the court of appeals, Petitioner essentially echoed the argument we make here relating to his reliance on his accountant. *See* Appendix C, *infra*, pp. 13a-14a.[7]

The argument that Petitioner was entitled to a jury instruction on his defense of good-faith reliance on a tax professional was also raised in the district court and raised in his requested jury instructions. The instructions requested by Petitioner on this very issue, all of which were refused, are reproduced in Appendix D, *infra*, p. 15a.

In sum, there is a substantial basis in the record for the Court to rule on the question whether Petitioner was entitled to a jury instruction as to his defense of good-faith reliance on a tax professional. What is more, there is no doubt that the issue was fully presented to both courts below. The importance of the question for the conduct of criminal tax prosecutions therefore warrants review by this Court.

CONCLUSION

For the reasons stated above and in the Petition, the Petition for a writ of certiorari should be granted.

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[7] For the convenience of the Court, we have reproduced the pertinent portions of Petitioner's briefs in the court of appeals in Appendix C, *infra*, pp. 13a-14a.

Respectfully submitted,

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APPENDICES

APPENDIX A

EXCERPTS FROM TESTIMONY OF RON SUPPA

Q. Mr. Suppa, where are you presently employed?
A. I'm presently employed at Pedroni Fuel Company. . . .
Q. How long have you been employed there?
A. 20 years.
Q. What's your position there?
A. I'm the controller.
Q. And does Pedroni Fuels have a Tax Department?
A. Yes, they do.
Q. Who is it?
A. Me.
Q. How long have you been the Tax Department and the Controller at Pedroni Fuels?
A. 20 years.

(A 2520 at T. 14381 line 24 to 14382 line 14)

Q. And when did you get your CPA license?
A. 1969.
Q. And do you have any other, do you have a private practice as well?
A. Yes, I do.
Q. And what is the nature of your private practice?
A. A small public accounting firm in Vineland, New Jersey.
Q. And how long have you been operating as a small public accounting firm in Vineland?
A. 19 years.
Q. And prior to your own practice, did you work at any other accounting firm?
A. Yes, I was with a public accounting firm for 13 years and was a partner in that firm.

(A 2520 at T. 14383, line 3 to line 16)

Q. During the time period, and all my questions are addressed to the time period if I forget to say it.

A. Yes.

Q. During the time period 1989 to 1993, did Pedroni Fuel ever buy two oil or diesel oil tax-paid?

A. No.

Q. Why not?

A. Because we had a 637 and we purchased it [no. 2 oil] without the taxes.

Q. And did you ever sell either two oil in a taxable transaction, or sell product as diesel fuel or as—yeah, as diesel fuel to truck stops?

A. Yes.

Q. And so under those circumstances, would you be selling product that you would obtain tax-free?

A. Yes.

Q. What did you do with the taxes you would collect?

A. The taxes would obviously go right into our operating account, and then in turn when they were due to the taxing authority, sent directly to the taxing authority.

A. And who was responsible for making the decisions in that regard?

A. Myself.

Q. And what if any, efforts did you use to make sure that people who should've been paying the taxes to you, actually paid them?

A. Well, I was preparing the necessary tax reports and I would bill the customer the taxes if they were in place - - actually the credit department would see that the bills were paid, but I was responsible for making sure that the transaction, a taxable transaction was, was billed as taxable.

(A2521-22 at T. 14387, line 19 to 14388, line 25)

Q. Now, the companies that are listed on this stipulation and the chart were, what relation did they have to Pedroni Fuels?

A. They would be customers of Pedroni Fuel.

Q. And did they purchase fuel from Pedroni Fuels?

A. Yes.

Q. Were there—did you make a determination with, did you review yourself, in fact, the government's sum-tax schedules?

A. Yes, I did.

Q. To try to count up the different transactions that related to Pedroni Fuels?

A. Yes, I did.

Q. And these numbers on the stipulation and on that chart reflect the government's , the summary of the government's sum-tax schedules as they've represented it, correct?

A. Correct.

Q. And did you review the Pedroni Fuels 637 Files for these particular companies?

A. Yes, I did.

Q. And who was it who made the decision that the sales to Petro-Lux were and should be treated as tax-exempt sales?

A. Myself.

Q. And what documents did you use to make that decision?

A. I had a valid 637, I had the licensing from the state of New Jersey, and the federal exemption certification, certifications.

Q. Right now we're talking about federally tax-exempt for the . . .

A. Correct.

Q. For my questions presently, during this period. And were there , there were a number of sales to Kings Motor Oil as well, correct?

A. That's correct.

Q. Who made the decision that those sales should be federally tax-exempt

A. I did.

Q. And what did you base that on?

A. I had a valid documentation, 637 and exemption certificate.

Q. And whose responsibility in the company was it to make those kinds of taxing decisions?

A. Myself.

Q. Now, with respect to American Minority Petroleum, Hillcrest and Madeno, who made the decision within Pedroni Fuels that those transactions and sales should be treated as tax-exempt, federally tax-exempt?

A. I did.

Q. Now, and in each case did you base it on your 637 file?

A. Correct.

Q. Would you in these cases also in the ordinary course follow up with the Internal Revenue Service and check with them?

A. Yes.

Q. Now, if a tax—withdrawn. If a company has a 637, do they have a right to ask you to sell them tax-exempt?

A. Yes.

Q. Who gives them that right?

A. Internal Revenue Service when they issue the 637.

Q. And was there ever a time that you can recall that Richard Pedroni countermanded the decision you made that transactions were tax-free?

A. Never.

Q. Did he ever concern himself on those topics with you at all?

A. No.

(A2523-24 at T. 14394, line 8 to T. 14396, line 24)

Q. Now, did Pedroni Fuels maintain 637 files?

A. Yes.

Q. Who was responsible for those files, gathering and maintaining them?

A. Myself and Jim Hughes.

Q. And what is a 637?

A. It's a license, registration, license issued by the Internal Revenue Service when the customer actually meets certain qualifications, they can purchase product tax-free.

Q. And what, if anything in addition to gathering the 637, did you do to make sure that Pedroni Fuels was properly handling the decision on whether a transaction was tax-free or whether they should collect the taxes?

A. Well, we were also required to obtain exemption certificates from the various customers, and also when we received the 637s, we , I would make the necessary phone call to the excise tax coordinator to verify that the 637 was valid.

Q. Now, did you during this entire period and - - withdrawn. In the very beginning of this period were you making calls to the IRS?

A. At the beginning, no.

Q. What caused you to begin making call to the IRS?

A. We had an excise tax auditor from Internal Revenue Service, and during the audit he mentioned to me that it might be wise for me to start verifying that these 637s were valid.

Q. And did he talk to you specifically about calling the IRS?

A. Yes.

Q. What did he tell you?

A. Well, he recommended that I would call Mountainside and obtain the, the verbal verification.

Q. And did you, did you follow that suggestion?

A. Yes, I did.

Q. Did you discuss that suggestion with anybody else at Pedroni Fuels?

A. Yes, we, I discussed it with Richard Pedroni.

Q. Did Pedroni Fuels adopt a policy with respect to calling the IRS on 637s after these events?

A. After those events we called on everyone.

Q. And was there anybody else besides yourself who would call from time to time?

A. Jim Hughes would call from time to time.

(A2522-23 at T. 14389, line 21 through T.14391, line 15)

Q. Now, what if any, financial incentive did Pedroni Fuels have to collect taxes, state and federal, on excise transactions?

A. Well, they had quite a stake in it, because by collecting the tax, we actually improved our cash flow because we had the use of the funds from anywhere from 15 to 45 days until the taxing authority required the payment.

Q. And was there a policy at Pedroni Fuels as to what would be done if there were questionable certifications or questions about the supporting documents for a nontaxable transaction?

A. We would initially try to clear up those questions, but the end result was that there was still some doubt and we, and when in doubt we collected the tax.

Q. And whose policy was that?

A. Richard Pedroni, Pedroni Fuels and myself.

(A2523 T. 14392, line 24 to T.14393, line 14)

State taxes

Q. Now, with respect to state taxes, what is the gross receipts tax?

A. It's a tax on petroleum products sold in the State of New Jersey.

Q. And what, if anything did—withdrawn. Who is obligated to collect and pay over that tax to the State government?

A. The final sale, wholesaler sales, either the distributor or the licensed wholesaler.

Q. Now, what, if anything, did you do in your capacity as Comptroller to make a decision as to whether or not you should charge companies who were buying in bulk from Pedroni Fuels the gross receipts tax?

A. I obtained from the customer a copy of their direct payment certificate which entitles them to pay the gross receipts tax directly to the state and instead of to us.

Q. And did you obtain that copy of that document for each of the companies listed, Petro-Lux, Kings Motor Oil, American Minority Petroleum, Hillcrest and Madeno?

A. Yes.

Q. And can you tell the jury, if a company you're selling to has a direct payment certificate, do they have a right to get the product from you free of the gross receipts tax?

A. Yes.

Q. Who gives them that right?

A. State of New Jersey.

Q. Now, with respect to the state excise taxes, during this relevant time period what was the point of taxation?

A. The tax was charged at the final sale from the final wholesaler to the retailer.

Q. And are there, and I forgot to do this—let me—well first with respect to the state taxes, are there—withdrawn. Let me go back if I can to the federal 637 system. Are there, in addition to 637s, are there other exemptions from excise taxes in the federal system besides just the 637?

A. Yes.

Q. Could you tell the jury what some of those are?

A. Are there exemptions for state and local government purchases, exemptions to nonprofit organizations, a certification that the product is going to be used for off highway use.

Q. And . . .

A. Marine vessels.

Q. I take it there are a number of them?

A. Yes.

Q. Would you make an effort with respect to each customer to research the different exemptions if you thought they were relevant or if it's brought to your attention?

A. Absolutely.

Q. Was that anybody else's job at Pedroni Fuels besides yours?

A. No.

Q. Now, going back to the state system, during the period 1989 to 1992, I think you said that the point of taxation was the last wholesaler who sold to a retailer. Did that system change in July of 1992?

A. No.

Q. Was there ever a time that the point of taxation in the state system was shifted to the retailer?

A. Oh, yes, that's right, in '92, now, end users must obtain a seller/user license in order to pay their taxes directly to the state rather than for the wholesaler distributor to have to pay the tax.

Q. But—and so in the normal course after July 1992, the retailer, that is a truck stock, was obligated to pay the tax unless they had a license, correct, a seller/user license?

A. Yes.

Q. All right. Now, on the stipulation as you can see there are no Pedroni Fuel sales after June of 1992, so I'm going to, on the state system, address questions to you for the period 1989 to July of 1992, the period before that change in the state system, okay?

A. Okay.

Q. Were there, what was the point of taxation in that period from 1989 up to July of 1992?

A. Unless you had an exemption or was registered with the state for either as a distributor or jobber, then we charged the tax.

Q. Okay. But what was the point of taxation in general?

A. The end user, from the wholesaler to the end user.

Q. All right.

A. The last wholesaler to the end user.

Q. Now, if a company that Pedroni Fuels was selling to was registered with the State of New Jersey as a wholesaler, did you have to charge them the tax?

A. No.

Q. And was there a publication put out by the state that listed names of people registered with them?

A. Yes. The state would publish a catalog every six months with a list of jobbers, wholesaler distributors who have licenses, importers, exporters.

Q. And did you use that list in your job at Pedroni Fuels in determining whether or not a transaction before July of 1992 should have state excise taxes charged on it or not?

A. Yes.

Q. Did you also endeavor to obtain copies of various state licenses from customers, people you're selling oil to?

A. Always.

Q. Now were there, similar to the federal system, were there also other exemptions besides this registration and licensing exemptions that would apply to your decision as to whether or not to charge state taxes?

A. The same, some of the same similar exemption, in this case the federal government or the state agencies would not be charged the tax. Also off highway use, farmers, nonprofit organizations.

Q. Are there a long list of other ...

A. Also, yes.

Q. . . .exemptions?

A. Correct.

Q. And in making your decisions as to taxability, would you look at those if it seemed like they may apply to you?

A. Yes, that's correct.

(A2524 T. 14396, line 25, Line 10 to T. 14401, line 15)

Q. Now, these, these 637 files were maintained in your regular course of business, correct?

A. That's correct.

Q. And you used them for what purpose?

A. To determine the taxability of transactions.

Q. And were these companies that are listed on the Stipulation on the board, were they real companies?

A. Yes they were.

Q. How do you know that?

A. 637 were issued by Internal Revenue.

Q. So you relied on them in making those decisions?

A. Absolutely.

Q. Now, Mr. Stahl asked you about the handwriting on the, on the fourth page of D-PED-126. Did - - whose handwriting is it again?

A. Myself.

Q. And what does it indicate to you?

A. That I spoke to Mary Person at Mountainside. The Executive—Federal Excise Tax Coordinator to confirm the validity of the 637.

Q. And that means you personally called?

A. That's correct.

Q. And if anybody asked you if you had done that job, you would have told them what?

A. That I called and confirmed the validity, and that it was acceptable.

(A2526 at T. 14406, line 24 to T. 14407, line 24)

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA

v.

DANIEL ENRIGHT, ET AL.

CRIMINAL NO. 95-388 (JEI)
HON. JOSEPH A. IRENAS

STIPULATIONS

The defendant, Richard Pedroni, and the United States hereby stipulate and agree that the Sum Tax Schedules introduced by the government as Exhibits Sum-Tax 16A, 16B, 16C and 16D represent transaction where Pedroni Fuels issued sales invoices to the following companies. The Sum-Tax schedules 16A-D reflect the following number of transactions during the time periods identified herein:

1. Petrolux

   January 11, 1990 to February 28, 1991 (15 Transactions)

2. Kings Motor Oil

   January 18, 1990 to October10.1991 (14 Transactions)

3. American Minority Petroleum

   October 25, 1991 to January 13, 1992 (16 Transactions)

4. Hillcrest

   January 17, 1992 to May 13, 1992 (18 Transactions)

5. Madeno Transportation Company

   May 21, 1992 to June 29, 1992 (15 Transactions)

There are no Pedroni Fuels invoices to any other company in the Sum Tax Schedules introduced by the government. Pedroni Fuels is involved in 78 transactions out of the 1,011 transactions reflected in their Sum Tax exhibits and charged in the indictment. The 78 transactions involve 46,872,000 gallons out of a total gallonage of 667,000,000 which is approximately 7% of the total gallonage involved in this case.

Walder, Sondak & Brogan, P.A.

By: /s/ James A. Plaisted
JAMES A. PLAISTED, ESQ.
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U.S. Attorney for District of New Jersey

By: /s/ Stephen Ponticello
STEPHEN PONTICELLO, ESQ
Special Assist. U.S. Attorney

APPENDIX C

Excerpts From Richard Pedroni's Initial Brief in the Court of Appeals:

> Pedroni's good faith reliance upon his CPA and a system they created to insure compliance with all tax obligations rebutted Pedroni's criminal intent as to all charges. Yet, the Trial Court refused to explain that point to the jury. (Fn 10) Defendant is entitled to a jury instruction on any defense for which there is a foundation in the evidence, and the Trial Court's failure to do so requires a new trial. [Citing, among other authority, *Mathews v. the United States*, 485 U.S. 58, 63 (1988).]
>
> The Supreme Court has held a good faith reliance upon a professional advisor's sufficient to defeat the imposition of a tax penalty in a civil negligence case. *United States v. Boyle*, 469 U.S. 241, 251 (1985). If such reliance serves to rebut a charge of negligence when the taxpayer bears the burden of proof by a preponderance of the evidence, a fortiori, it is sufficient to establish the absence of criminal intent in a case where the government must prove its case beyond a reasonable doubt.

Excerpts From Richard Pedroni's Reply Brief in the Court of Appeals:

In Petitioner's Reply Brief, this argument was similarly emphasized. One argument caption stated (p. 14):

> A. The Trial Court Failed to Give Pedroni's Good Faith Defense Instruction *Concerning his Overall Reliance On His Accountant* And The IRS's Advice.

In pertinent part, the text of the Reply Brief under that caption stated (Reply Br. 19):

> Pedroni likewise merited and deserved a charge on his good faith defense. His accountant testified at length about their joint efforts to honor and adhere to the IRS

policies for suppliers of fuel. Pedroni's accountant testified about their establishment of a system with double protection. They sold (a) non-taxable No. 2 oil to (b) licensed companies. IRS personnel and other industry experts testified that in fact the professed belief of Pedroni and his accountant and their practice more than complied with accepted and careful practice for legitimate oil suppliers at the time. Not only did Pedroni prove that he intended to satisfy the law and put in a plan to do so, but the plan that was instituted was approved by the IRS and the state. (Scheffler's and Suppa's testimony) At the least, Pedroni was entitled to an instruction that his good faith was a defense. (Reply Br. 19).

APPENDIX D

Excerpts from Richard Pedroni's Requests For Jury Instructions:

> Defendant, Richard Pedroni has introduced evidence that he relied on the advice of an accountant, Mr. Suppa. If you find that Richard Pedroni in good faith placed reliance on this accountant to make sure that Pedroni Fuels acted properly with respect to all tax laws, or such evidence raises in your mind a reasonable doubt as to Mr. Pedroni's guilt, you should find him not guilty. (A769)
>
> If you find that Richard Pedroni placed reasonable reliance on Mr. Suppa to make sure that Pedroni Fuel acted properly with respect to all tax laws, then you should find him not guilty. (A764)
>
> Any good faith belief, as referenced above, would be a defense to all charges . . . (A764)
>
> If you find that the taxability of these transactions was determined by someone other than a particular defendant, that any such defendant was not involved in tax decisions, then you should consider that fact in determining whether the defendant acted in good faith, or whether he possessed a criminal intent to join a conspiracy to cheat on taxes and knowingly and willfully violated the State and Federal tax laws as charged.
>
> If you find that defendant Richard Pedroni believed in good faith that the procedures established at Pedroni Fuels to comply with the Internal Revenue laws and the tax law of the State of New Jersey, was adequate to insure that Pedroni Fuels was complying with its duties under the tax laws, you should find him not guilty. (A769)